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Supreme Court of the United States

October Term, 1960

No. 999

ANTHONY PASSERO,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

ANTHONY PASSERO,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony Passero, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 27, 1961.

Citations to Opinions Below

The opinion of the District Court denying the defendant-petitioner's motion for a new trial, printed in the Appendix hereto, *infra*, p. 18a, is reported in 185 F. Supp. 665. The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, p. 1a, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 27, 1961 (Appendix, *infra* p. 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where a defendant in a federal narcotics prosecution who asserts his innocence and that the case against him was concocted by the Narcotics Agents, discovers for the first time after his conviction that the original arrest affidavit sworn to by the Chief Agent in the case was indisputably false in its most essential averments—the falsity having been latent until the Agent's trial testimony made potential its exposure—do such facts, and the Government's non-disclosure thereof at the trial, so taint the Government's case as to vitiate the conviction?

2. Did those facts work a denial to the petitioner of fair trial on issues of credibility of Government witnesses?

3. Was the arrest which was based on the fraudulent affidavit an illegal arrest, and was the alleged incriminating information obtained by virtue of such arrest admissible?

4. Are the points argued in the above three questions ineffectual to secure a new trial solely on the ground of the "non-diligence" of the defense in failing sooner to discover the Government's latent fraud and on the theory that the defense had "constructive" knowledge of all the Court records, or may those points prevail on broader principles of fairness and integrity in the administration of federal criminal justice?

5. Was the arrest additionally illegal because of the protracted delay in obtaining the warrant and in executing it? This question was raised in the court below but not in the District Court, and is urged as plain error within the mean-

ing of Rule 52(b) of the Federal Rules of Criminal Procedure.

6. Did the District Court err in instructions to the jury whose effect was to subject the petitioner to incrimination by testimony received solely under, and pertinent solely to, count six of the indictment, as to which count the Court had acquitted him on the ground of failure of proof?

7. Did the District Court err in instructions, or in refusing to instruct, concerning character evidence?

8. Was the petitioner denied a fair trial by prejudicial statements of the prosecutor resorting to "guilt by association" and by the District Court's rulings in regard thereto?

9. Did the courts below err in denying the motion for a new trial?

10. Should the indictment be dismissed?

Constitutional Provisions and Statutes Involved

The statutory provisions on which the petitioner's prosecution was founded (18 U.S.C. § 174, 26 U.S.C. § 4705(a)) do not, as such, give rise to any issues in this case and we therefore do not print them. Involved issue-wise are the search and seizure provision of the Fourth Amendment and the due process clause of the Fifth Amendment of the Constitution of the United States, and 26 U.S.C. § 7607; the pertinent portion of the latter statute[1] is:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the

[1] Discussed at p. 17, *infra* (fn.).

Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(a)), may—

* * * * *

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Statement

Petitioner was convicted in the District Court, after a jury trial, on two counts of an indictment (D7a)[2] alleging sale and on two companion counts alleging concealment of heroin, in violation of 26 U.S.C. § 4705(a), 21 U.S.C. § 174 and 18 U.S.C. § 2—under which statutes the District Court's jurisdiction was invoked—and he was sentenced to six years on each count (to run concurrently) (D123a—Appendix, *infra*, p. 17a). Petitioner appealed to the Court of Appeals (D125a, D126a) from said judgment of conviction and from an order of the District Court denying a motion for new trial (D121a). The judgment of the Court of Appeals here sought to be reviewed affirmed the conviction and the denial of the motion for new trial (Appendix, *infra*, p. 17a). The issues relating to the motion for new trial (D84a to D94a), as will appear, are of particular importance.

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[2] "D—a" refers to the "Appellant's Appendix" (printed) in the court below, nine copies of which are filed herewith.

The trial and conviction took place in March 1960 (D3a, D4a). We do not dispute that the evidence at the trial was sufficient to convict the petitioner if the jury chose to believe the Government's witnesses rather than the petitioner (D46a-D62a), who took the stand, denied all the charges and presented character testimony (D58a-D59a).

The dispositive issues at the trial concerned the credibility of the Government's witnesses and the *bona fides* of the prosecution, the defense claiming that the narcotic agents had concocted a case against an innocent man, who had no prior criminal record (D90a-D91a). These credibility issues unexpectedly took on new life after the appeal from the judgment of conviction was docketed in the Court of Appeals in May 1960 (D5a). For, in the course of reviewing the file in the latter court the petitioner's attorney, routinely examining each paper in the file in preparation for printing of the "Appendix", discovered for the first time that the sworn affidavit or complaint of arrest on which the petitioner had originally been arrested in September 1959 was false in its main material averments, namely, that the affiant had directly eye-witnessed the petitioner actually committing the alleged offense on which the affidavit and arrest were based (D84a-D94a). The petitioner thereupon obtained from the Court of Appeals, in June 1960, an order remanding the case to the District Court for consideration of a motion for new trial based on the aforementioned discovery (D5a, D84a; Appendix, *infra*, p. 4a). As stated, the District Court denied the motion (D111a, D121a; Appendix, *infra*, p. 30a) and the Court of Appeals affirmed the denial (Appendix, *infra*, p. 17a).

Details pertinent to the issues arising from the false arrest affidavit and the unsuccessful motion for new trial

based thereon are: The counts on which petitioner was convicted involved alleged happenings on August 15 and 27, 1958 (D7a). The sworn arrest affidavit and the United States Commissioner's warrant were based on the alleged happening of *August 27, 1958*, and were dated *May 8, 1959* (D95a-D98a). The arrest took place *September 14, 1959* (D85a). The arrest affidavit was sworn to by Narcotic Agent Fred T. Dick, who stated as his supporting "facts" in the affidavit (D95a-D96a):

> "That the source of your deponent's knowledge is a conversation had between William H. Newkirk and Anthony Passero, one of the defendants herein, in which Newkirk related to your deponent that he had placed an order with Passero for the above-mentioned amount of heroin; personal observations by your deponent in which your deponent observed Vincent Papa, also known as Charles Rinaldi, and Anthony Passero together on the northeast corner of 42nd Road and Crescent Street in Long Island City, Queens, N. Y.; *your deponent further observed Anthony Passero walk across the street and meet William Newkirk and hand the above-mentioned heroin to him and observed Passero to take money in exchange therefor;* deponent further observed the defendant Passero rejoin Papa on the above-mentioned corner and saw both defendants leave in a 1949 grey Cadillac." (Emphasis added)

Dick's affidavit had been dictated or drafted under the initials of Frances W. Rhinow, Esq., the Assistant United States Attorney who tried this case for the Government (D87a). That Dick's affidavit was false in averring that Dick had personally observed Passero actually committing the alleged offense (see italicized portion of the above quotation), was demonstrated by the fact that at the trial

Dick testified unequivocally that he did not personally so observe (D87a-D89a) . Both of the courts below seemingly accepted as established that Dick's trial testimony had thus contradicted his arrest affidavit (D117a; Appendix *infra*, pp. 7a, 13a, 24a-25a).

Dick was the Narcotic Agent in charge of this case (D27a). Thus, latent in the Government's case at the trial, unknown to the defense, was the fact that the Government's investigative chief was vulnerable to a cross-examination showing that he had undisputedly resorted to material falsehoods in the very commencing of the prosecution which the defense insisted was concocted against an innocent man, thereby making the credibility of the Government's witnesses, and indeed the integrity of the entire prosecutive endeavor, the central issues in the case. The prosecution which was the setting for these issues, moreover, was one in which, *inter alia*, the following circumstances pointing to acute issues of credibility were presented: (1) All of the Government's witnesses were official underlings of the investigative chief (D46a-D62a). (2) Each such witness' testimony was interwoven with testimony of the chief himself for both supplementing and corroborating purposes (*ibid*). (3) Each such witness' testimony, especially that of the "special employee" Williams and of the chief himself, contained suspicious flaws pointing to *mala fides* (D50a-D51a, D54a-D55a, D56a-D57a, D61a-D62a). (4) The chief testified that he was himself the recipient from the defendant of an alleged confession or admission, which the defendant absolutely denied having made (D13a-D17a, D18a-D24a, D25a, D58a). (5) The chief was endowed with special authoritativeness and credibility in the jury's eyes by virtue of his being seated throughout

the trial at the Government's table as advisor to the prosecutor (not in the record but undisputed). (6) The jury deadlocked as to a co-defendant in a decisional situation that had to turn solely on the credibility of the chief either as to the substantive charge or as to an unlawful search (D52a-D53a, D55a-D56a, D59a-D61a). (7) The Government tendered to the jury the issue of the credibility of its Narcotic Agent witnesses as a stand-or-fall proposition affecting not only this case but the entire national program of narcotic enforcement (D35a).

Notwithstanding the above-recited circumstances pointing to the acute importance of the credibility issues at the trial and the probability that the newly-found information concerning Dick's false affidavit would materially aid the defendant on those issue in a new trial, the court below affirmed the denial of our motion for a new trial on the dispositive ground that the defense must stand chargeable from the outset with *constructive* knowledge of the contents of Agent Dick's false affidavit because we must have known that the affidavit was in existence as part of the record in the case. The court below reached this conclusion even though it conceded (1) that we did not have actual knowledge of Agent Dick's false statements (Appendix, *infra*, p. 12a), and (2) that "cross-examination of Dick about the statements in his complaint might well have damaged his credibility • • • " (*id.* p. 13a). Even more strikingly, the court below reached its conclusion "regardless of the Government's knowledge of the change in Dick's version of what he saw on August 27 • • • " *(ibid).*

The following facts pertain to other issues presented by this petition:

A. As mentioned, Agent Dick said at the trial that petitioner made admissions or a confession to him which petitioner denied having done. This is supposed to have occurred on September 14, 1959, when Dick arrested petitioner (D13a-D17a, D18a-D24a, D25a, D53a-D54a). Thus the alleged admissions or confession were secured (if they were, which we deny) in the course of an arrest which we claim was unlawful because based on a fraudulent affidavit. Further, the alleged eliciting of the incriminating statements was said, according to the testimony of Dick, to have been aided by an implied threat to cause trouble for a brother of the petitioner. The alleged incriminating statements dealt with a certain 1950 Dodge which was relevant to count six of the indictment (D9a). Dick testified that he "told Passero unless he would disclose the location of the car that I would have to find his brother, question him and attempt to locate the vehicle" (D15a), and that Passero said that he would help find the 1950 Dodge, that since it was his brother's car he did not want his brother to get into trouble, that he was planning to give himself up the following day, that he "didn't want" his brother "to suffer for something he had done" (D13a-D15a).

B. As just noted, the alleged incriminating statements related to count six. The Government's contention under that count was that on September 8, 1959, another defendant, Moore, was seen in a car with petitioner and was caught with narcotics in her purse immediately after leaving said car, the above-mentioned 1950 Dodge (D15a, D52a-D53a). The only other testimony about this car was that petitioner and Moore had been seen in it on September 1, 1959 (D57a), and the alleged admissions to Agent Dick when petitioner was arrested on September 14, 1959, refer-

ring to this same car (D13a-D17a). Those alleged admissions were not claimed by the Government to cover any of the offenses except count six (September 8, 1959) (D24a). The trial Court correctly deemed the proof insufficient to support a conviction against petitioner for possession of narcotics, acquitting him under count six. However, in instructing the jury concerning this, the Court said (D40a-D41a):

> "the dismissal was not a finding by the Court that the defendant Passero was or was not in an automobile, as stated by the Government's witness. This dismissal does not constitute a reflection upon the credibility of any witness, and no inferences are to be drawn, one way or the other, from this dismissal."

A defense exception to the above charge was denied (D70a-D71a). We urged before the Court of Appeals on the basis of the foregoing that not only was the reception in evidence of Dick's testimony about the alleged admissions improper because said evidence was the product of an unlawful arrest (as recited in our preceding paragraph herein), but also that neither the above-quoted jury instruction nor anything else in the trial record was sufficient to protect petitioner against the damaging effects of said "admissions" evidence under the four counts to which it was in no way relevant—i.e., the jury were allowed to consider Dick's testimony of petitioner's alleged self-incrimination in passing on his overall guilt even though that testimony was both barred by the Fourth Amendment and relevant, in any event, only to a count which was adjudged out of the case as a matter of law.

C. A defense exception for failure to charge "that character testimony may be such that it alone may create a reasonable doubt" was denied (D72a).

D. The prosecutor's summation at the trial included:

(1) "If you don't believe the Agents you may just as well close the book on the prosecution of narcotics" (D35a); further, referring to Agents Dick, Fluhr and Heneghan, "We can't just disbelieve all of these people" (D35a); referring to special employee Williams, a Narcotic addict and convict, "You don't have to believe everything that Williams said, but take it in the light that he bolstered up what the agents said, anyway" (D35a).

(2) "There has been some mention made as to this so-called guilt by association. All I can say is, Ladies and Gentlemen of the Jury, when you walk like a duck, talk like a duck, and you look like a duck, you are a duck" (D35a).

(3) The prosecutor used to the hilt the testimony purporting to link petitioner with the car allegedly involved in the count six offense which was dismissed as against petitioner (D29a-D30a).

The Court of Appeals found no merit in any of our points suggested by the preceding paragraphs "A" to "D" herein (Appendix, *infra*, pp. 14a-16a).

Reasons for Granting the Writ

1. The judgment sought to be reviewed tolerates, on the sole ground of supposed non-diligence of defense counsel, an outright fraud by a high federal law-enforcement officer, a fraud which compromises the ethical integrity of federal criminal justice as applied in this case—and a fraud, furthermore, whose exposure could not but have a significant effect favorable to the petitioner's hopes if he were given the opportunity to make such exposure before a jury in a

new trial. The exercise of this Court's power of supervision is necessary.

Agent Dick's fraud was perpetrated upon a federal judicial officer, the United States Commissioner.

Intrinsically such a fraudulent imposition upon a federal judicial officer by a federal law enforcement aide infuses a criminal prosecution with an element of taint. Such would appear to be the fair meaning of, and the principle underlying, cases like *Napue* v. *Illinois*, 360 U. S. 264, 269-270 (1959); *Mesarosh* v. *United States*, 352 U. S. 1, 9-14 (1958); *Communist Party* v. *Subversive Activities Control Board*, 350 U. S. 115, 124 (1958); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 355 (1931); *United States* v. *McKeever*, 271 F. 2d 669, 672 (C.A. 2, 1959); *United States* v. *Spangelet*, 258 F. 2d 338, 342 (C.A. 2, 1958).

Agent Dick's fraud touched vital areas of this case. The false averment that Dick saw the actual commission of the alleged offense was not merely fraudulent in itself. It was also a representation that, in addition to whatever other eyewitnesses the Government might have, it also had the high-ranking Agent Dick as an eyewitness.

The non-discovery of the fraudulent Dick affidavit until after the original appeal herein was lodged imposed two serious disadvantages on the petitioner: (1) It deprived us of the opportunity to attack the credibility of Dick and the other Narcotics Agents by bringing to the jury's attention the fraudulent affidavit—as seen, the court below acknowledged that "cross-examination of Dick about the statements in his complaint might well have damaged his credibility." (2) It prevented us from urging at the trial

the non-admissibility of the alleged admissions or confessions extracted from petitioner by Dick at the time of the arrest, the warrant for which was based on the fraudulent affidavit.[3]

The only authority cited by the court below for what it terms "the salutary rule that parties may not later complain of their ignorance of what was in the court file and available to them at all times" (Appendix, *infra*, p. 14a, is *United States* v. *Walker*, 197 F. 2d 287 (C.A. 2, 1952), cert. denied 344 U. S. 877 (id., p. 12a). But the *Walker* case involved no issue of government fraud. It would appear that the above "salutary rule" as here applied by the court below makes its initial apperance in this case, *viz.*, as a rule which immunizes from cross-examination the perpetrators of governmental fraud in criminal prosecutions where such fraud is not detected until after conviction. Cross-examination concerning perjury by federal law enforcement officers is to be barred by a special rule of laches, as it were. The court below has decided an important question of federal law which has not been but should be decided by this Court.

Further, we do not concede that the assumed "non-diligence" of defense counsel has been properly evaluated by the court below. Petitioner's counsel who discovered the false Dick affidavit after the appeal was docketed was his trial counsel, but was not his counsel at the time of the original arrest and arraignment before the United States Commissioner, being first engaged as counsel two days thereafter (D85a, D89a). Even if the Dick affidavit had

[3] The questions of the lawfulness of the arrest and the admissibility of the confession are further treated, *infra*.

been examined at that time there would have been no reason whatever to suspect its *latently provable* falsity; nor, we submit, would it necessarily have bespoken "non-diligence" if, having seen said affidavit at any time thereafter except perhaps very shortly prior to the trial, defense counsel had remained unalerted to the then still wholly latent falsity. It would seem, rather, that nothing short of the most phenomenal "diligence", coupled with a good sprinkling of sheer luck, could have availed to achieve an alerting of defense counsel even at the trial. But there was one person who must have known all along that the affidavit was a lie, and who likewise must have known at the trial, then and there, that the trial testimony was inconsistent with the affidavit. That person was Agent Dick. Is it conceivable, when Dick swore in the affidavit to seeing things he never actually saw, that he did not realize he was lying? If it be said that perhaps by the time of the trial Dick had forgotten his lie, then what of *his* "non-diligence" as concerns the duty to alert the prosecutor, and, through that officer, to alert the defense, the court and the jury? The court below showed no slightest perturbation, by word or hint in its opinion, over Dick's "non-diligence".

Cases may doubtless be imagined, as the court below suggested (Appendix, *infra*, p. 12a), where the non-diligence" of a defense attorney could be a camouflage for the shrewd tactic of postponing use of the evidence of prosecutive taint in the arrest complaint. But in the nature of things such a hypothetical opportunity for defense counsel could rarely arise, and its detection when brought under scrutiny would be virtually certain, because somewhere in the recordation of the happenings of the proceeding, either in court clerks' records or in officers' memories, would

repose proof that the defense had seen the original complaint or a copy thereof, for these are papers which remain in official custody and are not served. It would be a foolhardy defense attorney who essayed such a venture. And the accomplishment of the important purpose of deterring law enforcement officers from making false arrest affidavits, and thereby instituting false prosecutions, would obviously have been furthered by a judgment of reversal herein—and would be furthered by this Court's exercise of review herein.

Even tested by the conventional principles of common law civil "fraud"—and surely the tests in a criminal prosecution by the Government of the United States are not less fastidious in what is required of a delict-accused actor—the doctrine announced in the decision below looking to a species of "constructive" knowledge of fraud by the victim thereof would be found offending to the sense of justice. Cf. Harper and James, *The Law of Torts* (1956), Vol. 1, § 7.12 pp. 581-582:

> "• • • The policy of the law which bars one guilty of equal fault from recovering from another for loss to which the fault of both contributed, obviously has no application *in cases of actual fraud inasmuch as the parties are not in equal fault.* It does not lie in the mouth of a defendant to argue that although he intended to cheat the plaintiff, by lying to him, the latter ought not to recover because he should not have trusted him. Accordingly, the more discriminating cases have held that, although the plaintiff's negligence may be a defense in an action based on defendant's negligent misrepresentations, *it will not avail against an intentional misrepresentation.*" (Emphasis added)

The philosophy of the decision below is in manifest contrast with the precepts stated by the scholarly authors just quoted. It was not always thus in the Second Circuit. An earlier bench of that same court, *per* Judge L. Hand, in *Falter* v. *United States*, 23 F. 2d 420 (C.C.A. 2, 1928), cert. denied 277 U. S. 590, knew not the jurisprudential attitude imaged in the "salutary rule" of the decision here sought to be reviewed. The *Falter* decision affirmed a conviction for conspiracy to defraud the United States in acquiring war-surplus textiles. Defendant-appellant Falter, the government official mainly instrumental in the fraud, urged in defense that his official successor, Cole, had available all the records needed to alert himself against the fraud. Rejecting this argument on the basis of common law "fraud" analogies, the court said (23 F. 2d at 424):

> "* * * Those cases do, indeed, contain general statements that, if the plaintiffs has the means at hand by which he can check the fraud, he may not complain; but these are to be read in the light of the facts. When the parties do not have equal means of knowledge, it is immaterial that the victim, if more suspicious, could have discovered the cheat [citing cases].
>
> * * * Falter had just been in charge of the entire Textile Branch. He knew what he had done, and what were the records, far better than could Cole who had just been substituted for him * * * To say that the defendants are to be excused because of the success of their contrivances would be to sanction the very consummation of the crime."

How apt to the case at bar are several of Judge Hand's expressions in the above quotation.

To the reasoning of the court below herein that the trial testimony of Agent Dick was "less damaging" to petitioner than the statements in the false arrest affidavit (Appendix, *infra*, p. 13a), we reply: While Dick's fraudulent affidavit does "incriminate" petitioner more than does the trial testimony, it could not conceivably hurt him at a new trial because it is indisputably false. Exclusion of Dick's "more damaging" fraudulent averments was of small comfort to petitioner then, because Dick's trial testimony still incriminated petitioner who, claiming complete innocence, derived no benefit from the denial of a new trial merely because the government's testimony which was thereby immunized from *de novo* scrutiny was "less damagingly" incriminating and "less damagingly" mendacious, leaving petitioner "less damagingly" convicted. What petitioner sought by his motion for a new trial was a chance to demonstrate to a jury that Dick was lying in this case, not lying "more" or lying "less", but lying *in toto*, about petitioner's alleged offenses.

2. The court below found it unnecessary to pass on our contention that the arrest was unlawful as based on a fraudulent affidavit[4], for it held that "whether or not the

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[4] Consequently we do not in this petition argue at length the question of the lawfulness of the arrest, which was extensively gone into below. We note, however: (1) It is ineffectual to contend (cf. the opinion of the District Court herein, Appendix, *infra*, p. 23a) that the arrest was sustainable under the Narcotics Control Act (26 U.S.C. § 7607). See the granting of certiorari, this Term, in No. 574 (*Mario Di Bella* v. *United States*). See also the legislative history of the latter statute, U. S. Code Cong. and Adm. News, 84th Cong. 2d Sess. (1956), Vol. II, p. 3282; and cf. *Giordenello* v. *United States*, 357 U. S. 480, 487-488 (1958); *United States* v. *Pollack*, 64 F. Supp. 554, 558 (D.N.J. 1946). (2) This is not a case where an arrest affidavit which is merely "insufficient" (as distinct from *fraudulent*) may nevertheless be found adequate thanks to the remainder of its contents. Contrast, e.g., *Jones* v. *United States*, 362

arrest was legal, incriminating statements made while an accused is under arrest are admissible if made voluntarily. * * * There is no evidence in the record that suggests that Passero was in any way coerced * * * " (Appendix, *infra*, pp. 14a, fn.). In this the court below overlooked Agent Dick's own testimony, *supra*, that he put petitioner in fear for the security of his brother (D15a). The court's reasoning is fallacious for a more fundamental reason, however. Petitioner denied that he made the incriminating statements at all, thus putting in issue (once again) Agent Dick's credibility—both as to the making of the alleged statements and, *a fortiori*, as to their "voluntary" character. Petitioner prayed for a new trial for the purpose of a fairer opportunity to resolve these credibility questions. How does it meet this prayer to say, in effect, that the appellate court *assumes* there is no credibility issue as to the voluntariness of the alleged incriminating statements? Is this not reasoning in a circle? And is the circle anywise broken by the "non-diligence" theory previously discussed herein at length? The principal authority cited by the court below for this branch of its reasoning, *United States* v. *Walker*, 197 F. 2d 287 (C.A. 2, 1952), would not in any event control the situation which is here assumptively presented. The defendant in the *Walker* case *did*

U. S. 264 (1960); and *Draper* v. *United States*, 358 U. S. 307 (1959). Nor do the assumedly severable portions of this fraudulent affidavit suffice in themselves to sustain the issuance of a warrant on the basis of either personal knowledge or hearsay (D95a-96a). (3) See also the unreasonable lengths of time between the pertinent operative dates herein (the alleged offenses (August 1958), the warrant (May 1959), the arrest (September 14, 1959)). Cf. *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3, 1958), cert. den. 358 U. S. 880; *Dailey* v. *United States*, 261 F. 2d 870, 872 (C.A. 5, 1959); *Landesborough* v. *United States*, 168 F. 2d 486 (C.C.A. 6, 1940), cert. den. 335 U. S. 826.

not deny that he had made the confession. Therefore the *Walker* case never reached the credibility issue which is at the threshold of the problem of "voluntary confession" in our case. Examination of the authorities cited in the *Walker* case itself is similarly instructive—*United States* v. *Leviton*, 193 F. 2d 848, 853 (C.A. 2, 1951) cert. den. 343 U. S. 946; *In re Fried*, 161 F. 2d 453 (C.C.A. 2, 1947); and *United States* v. *Walker*, 176 F. 2d 564 (C.A. 2, 1949), cert. den. 338 U. S. 891—because in none of those cases was the making of a confession denied.

The important questions of search and seizure and due process presented by the foregoing should be determined by this Court in the interests of the proper administration of federal criminal justice.

3. We urged the Court below, unavailingly, to adopt the rule of the Seventh and Tenth Circuits that character evidence alone may create a reasonable doubt. For a full presentation of this issue and of the pertinent authorities, see *Petersen* v. *United States*, 268 F. 2d 87, 88-89 (C.A. 10, 1959). For the opinion of the Court below on this issue see Appendix, *infra*, p. 15a). The conflict between Circuits on this important point should be resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS,
Counsel for Petitioner.

May , 1961

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 145—October Term, 1960.

(Argued December 16, 1960 Decided April 27, 1961.)

Docket No. 26461

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ANTHONY PASSERO,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
MAGRUDER* and FRIENDLY, *Circuit Judges.*

Defendant appeals from his conviction, after a trial by jury in the Eastern District of New York, John R. Bartels, *J.*, for the sale and concealment of narcotics and from the denial of his motion for a new trial. 185 F. Supp. 665 (E. D. N. Y. 1960).

Affirmed.

* Sitting by designation.

CORNELIUS W. WICKERSHAM, JR., United States Attorney, Eastern District of New York, Brooklyn, New York (Nathan K. Trynin and Francis W. Rhinow, Assistant United States Atorneys and Judith A. Gelb, Confidential Assistant to the United States Attorney, on the brief, for *plaintiff-appellee.*

JEROME LEWIS, Brooklyn, N. Y., *for defendant-appellant.*

LUMBARD, *Chief Judge*:

The principal question on this appeal is whether the district court should have granted a new trial to Anthony Passero where his counsel has belatedly become aware of the contents of a government agent's sworn complaint for Passero's arrest, which complaint contained statements contrary to the agent's testimony at trial, although Passero and his counsel knew of the existence of the complaint for more than five months before trial.

We conclude that the district court acted within its discretion in denying the motion for a new trial as it is clear from the record that both Passero and his counsel knew of the existence of the complaint for many months before trial. Under such circumstances the defendant will not be heard to contend, after his conviction, that he could have used the complaint to examine the government agent at the trial and [to argue] that his failure to use it is excused by the fact that he was unaware of its contents. Accordingly, as we find no error in the conduct of the trial, we affirm the conviction and the denial of the motion for a new trial.

Opinion of the United States Court of Appeals

Anthony Passero was tried in March 1960 on charges of selling and concealing narcotic drugs on two occasions in August 1958. He was convicted on four counts of the indictment and sentenced to six years' imprisonment. After notice of appeal had been filed, his counsel moved this court to remand the case to the district court for consideration of a motion for a new trial. The basis for this motion was counsel's allegation that, in the course of preparing to file the record on appeal, he had discovered a complaint, sworn to before the United States Commissioner by Narcotic Agent Fred Dick, upon which complaint warrants had issued for the arrest of Passero and one Vincent Charles Papa. In this complaint, dated May 8, 1959, and set forth in the margin,[1] Dick swore that on August 27, 1958, he had

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[1] The complaint read as follows:

"Fred T. Dick, being duly sworn, deposes and says that he is a Special Agent of the Narcotics Bureau of the U. S. Treasury Department, duly appointed according to law and acting as such.

That on or about the 27th day of August 1958, in front of premises 4238 Crescent Street, Long Island City, Queens, N. Y., within the Eastern District of New York, the above named defendants, Anthony Passero and Vincent Papa, also known as Charles Rinaldi, did unlawfully sell, dispense and distribute a narcotic drug, to wit: One ounce and One hundred sixty-two (162) grains of Heroin Hydrochloride, a derivative of opium, for the sum of Two Hundred Twenty ($220.00) Dollars, to one, William H. Newkirk, knowing the same to have been imported contrary to law. (Title 21 United States Code, Section 174; Title 18 United States Code, Section 2.)

That the source of your deponent's knowledge is a conversation had between William H. Newkirk and Anthony Passero, one of the defendants herein, in which Newkirk related to your deponent that he had placed an order with Passero for the above-mentioned amount of heroin; personal observations by your deponent in which your deponent observed

personally observed Passero deliver narcotics to William Newkirk, a narcotic agent, and had seen him receive money from Newkirk. However, at Passero's trial, Agent Dick, on cross-examination, swore that he had not personally observed Passero deliver narcotics to Newkirk. On direct examination Dick had testified that he had seen Passero and Papa standing on a street corner—where Agent Newkirk had testified that the sale was made that same night—and that, after going around the block, Dick returned and saw Passero and Papa drive away together.

We remanded the case on June 13, 1960 to permit the district court to consider a motion for a new trial. Judge Bartels heard the matter on affidavits and denied the motion, 185 F. Supp. 665. Passero now seeks review of the order denying him a new trial as well as reversal of his conviction for alleged errors in his trial.

Passero urges that he is entitled to a new trial on two grounds both related to the discrepancy between Dick's complaint and his trial testimony. First, he asserts that the newly discovered evidence casts sufficient doubt upon his guilt so that the trial court, acting under Rule 33 of

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Vincent Papa, also known as Charles Rinaldi, and Anthony Passero together on the northeast corner of 42nd Road and Crescent Street in Long Island City, Queens, N. Y.; your deponent further observed Anthony Passero walk across the street and meet William Newkirk and hand the above-mentioned heroin to him and observed Passero take money in exchange therefor; deponent further observed the defendant Passero rejoin Papa on the above-mentioned corner and saw both defendants leave in a 1949 grey Cadillac.

Wherefore, your deponent respectfully prays that warrants issue for the apprehension of the above named defendants Anthony Passero and Vincent Papa, aka-Charles Rinaldi, that they may be dealt with according to law."

the Federal Rules of Criminal Procedure, should have granted him a new trial "in the interest of justice." Second, he urges that whether or not the evidence met the standards that have been developed to determine whether a new trial should follow the discovery of new evidence, the government's failure to inform his counsel of the affidavit deprived him of a fair trial and therefore vitiated his conviction.

Consideration of Passero's contention requires us to summarize the trial proceedings in order to evaluate the importance of Dick's testimony and the opportunities available to Passero and his counsel for the discovery of Dick's sworn complaint.

Passero was tried together with one Lillian Vashti Moore as both were charged in Count VI of the indictment with concealing heroin on September 8, 1959, but at the conclusion of the trial Count VI was dismissed as to Passero. Although the jury convicted Passero on four other counts for sales and possession of heroin on August 15 and 27, 1958, it reported a disagreement as to the defendant Moore.[2]

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[2] A third defendant, Vincent Charles Papa, charged with concealment of heroin on May 12, 1959, had pleaded guilty prior to trial.

As we are not here concerned with Count VI, there is no purpose in summarizing the evidence concerning the alleged events of September 8, 1959 except to point out that this had to do with agents following a car driven by Passero and arresting Moore after she left the car. Moore was found in possession of a paper bag containing heroin but at trial she denied knowledge of the contents of the bag.

THE TRIAL TESTIMONY

Events of August 14-15,1958

On the government's case, Agent Newkirk testified to the negotiations which he and an informer, Charlie Williams, had with Passero in August 1958 which he said resulted in sales of heroin on August 15 and 27. Shortly before midnight of August 14, Newkirk had Williams telephone Passero and arrange a meeting. The three men met at Charlie's Tavern in Long Island City and for $250 Passero agreed to sell two ounces of heroin which he said could be found in an outdoor telephone booth near a gas station. Some five minutes later—early on August 15—the witness and Williams drove to the booth and there, taped to a shelf, he found a white package containing envelopes filled with a white powder which he later delivered to Agent Dick in Manhattan.

Agent Dick testified that on the evening of August 14 he had given $250 in government funds to Newkirk and received from him a white powder which tests showed to be an opium derivative. He further stated that from his car parked outside Charlie's Tavern, he saw Newkirk and Williams and, shortly thereafter, Passero enter the tavern. He followed Passero from the tavern to the nearby Cocoanut Inn and thereafter, while driving along, saw Newkirk standing in the telephone booth near the gas station.

Agent Arthur Fluhr testified that he was sitting in another car outside Charlie's Tavern and saw Newkirk, Williams and Passero enter and leave the tavern in the order testified to by Newkirk. He then followed Newkirk and Williams and saw Newkirk enter the telephone booth and later return to his car.

Events of August 26-27, 1958

Agent Newkirk testified that on August 26 he telephoned Passero at the Cocoanut Inn. He said that Williams got on the telephone and talked to Passero and that he could hear Williams and Passero agree to a sale of "two pieces of heroin" for $220 later that night at Crescent Street near 42nd Road in Long Island City. Newkirk and Williams drove there and about midnight met Passero who handed Newkirk two cellophane envelopes containing a white powder. Newkirk gave $220 to Passero who then drove away in a gray Cadillac with Papa. Newkirk returned to Manhattan and gave the powder to Agents Dick and Fluhr.

Agent Fluhr testified that he was outside the Cocoanut Inn that night, that he saw Passero enter shortly before midnight and go into a telephone booth, after which Passero left and drove to 38-39 12th Street, Long Island City, went into the house, came out, and drove to Crescent Street and 42nd Road where he parked his car.

Agent Dick testified that on August 26 he gave Newkirk $250 of government funds and that evening drove in the vicinity of Crescent Street and 42nd Road, Long Island City, where he saw the defendant Passero and Papa standing on the corner. He said further that, after going around the block, he returned to see them enter a Cadillac car and drive away. Tests showed that the white powder which Dick later received from Newkirk was heroin.

Events of September 14, 1959

Dick testified that he arrested Passero in Astoria on September 14, 1959. According to Dick, Passero said that

he was going to give himself up the following day; that he would turn over his brother's Dodge[3] since "he didn't want him to suffer for something he had done"; and that he had been living for several weeks under an alias.

On cross-examination of Dick it was developed that his report of the arrest, made on September 15, did not include any of the statements which Dick attributed to Passero. Although Dick testified that he made "many reports" about the case, we have before us only one report and it concerns the defendant Moore. The record does show that Passero's counsel examined a report dealing with Passero's arrest but that is not in the record. The jury knew only that Dick had arrested Passero; so far as the record shows it did not know the basis for the arrest or even that the arrest had been made on a warrant.

The Defense

Passero testified on his own behalf and denied that he had sold narcotics to Newkirk or Williams on the August 1958 occasions or at any other time. He said that Dick's testimony regarding his statements made upon his arrest in September of 1959 was false.

On cross-examination, Passero admitted that prior to his arrest he had been living in an apartment under an assumed name and that he had been using a driver's license which he had obtained under a false name because his own license had been suspended for "persistent violations." Although at the time of arrest Passero was unemployed and

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[3] This car had allegedly been involved in the Count VI charge of September 8, 1959, which the district court dismissed as to Passero.

drawing unemployment insurance, he was in possession of an Oldsmobile automobile which he claimed was his and which cost $4,655, for which he had made a cash payment of $1,600. Passero, who had no criminal record, also called two businessmen as character witnesses.

The Government's Rebuttal

The government called in rebuttal its informer, Charles Williams. His testimony was not transcribed but Judge Bartels gave a detailed summary of it which both sides appear to accept as accurate. It appears that William corroborated the essence, if not the detail, of Newkirk's testimony. He said, moreover, that he had purchased drugs from Passero on several occasions prior to August of 1958. On cross-examination, it was developed that Williams had been under indictment for federal narcotic offenses during August of 1958 and that upon pleading guilty to three counts of selling narcotics he received a five-year sentence, which he was serving at the time of Passero's trial and which was less than the possible maximum of fifteen years. He had also been convicted by the State of New York for selling narcotics and for disorderly conduct. Judge Bartels charged the jury that there were a "number of discrepancies" in Williams' story, particularly with respect to his prior dealings with Passero; he also reminded the jury that Williams had admitted giving false testimony on the stand.

The Summations and the Verdict

As was to be expected, the summations analyzed the testimony in detail and drew the issues largely in terms of

the credibility of the government's witnesses. At one point the prosecutor said to the jury "if you don't believe the agents you may just as well close the books on the prosecution of narcotics." The defense took exception to this statement and Judge Bartels quite properly charged the jury that the statement "was inaccurate and improper" and that they should ignore and disregard it. The jury deliberated for six hours on March 15, 1960, and then convicted Passero on all four counts and reported a disagreement as to Moore.

* * * * *

The evidence adduced at trial obviously was sufficient to convict Passero if the jury chose to believe the government witnesses rather than Passero. In his motion seeking a new trial, Passero's counsel argued, however, that if the conflict between Dick's complaint and his testimony at trial had been brought to the attention of the jury, the defense's position on the credibility issue would have been greatly strengthened and the verdict might well have been different.

We are of the opinion that the record of the proceedings before the United States Commissioner, which was part of the record of the case in the office of the clerk of the district court, and which is before us, requires us to hold that Passero himself, and his counsel as well, must be charged with knowledge of Dick's complaint. The record compels the conclusions that Passero knew of the existence of the complaint on September 15, 1959, and his counsel knew of it two days later on September 17 when he appeared on behalf of Passero. Being charged with knowledge of the

complaint, the defense will not be heard to say that it did not know what the complaint said.

Passero was arrested by Dick on the evening of September 14, 1959 and the next day he was arraigned before United States Commissioner Max Schiffman who fixed bail in the sum of $25,000 and committed him to the custody of the United States Marshal in default of bail. The commitment recites that the defendant had been arraigned and that he had been informed of the charge against him which could refer only to the charge in Dick's complaint that the defendant had unlawfully sold, dispensed and distributed heroin on August 27, 1958, in violation of 21 U. S. C. § 174. This was in accordance with Rule 5(b) of the Federal Rules of Criminal Procedure which requires the Commissioner to "inform the defendant of the complaint against him" when a prisoner is arraigned. Thus Passero knew, at the time of his arraignment and commitment, that there was on file with the Commissioner a complaint charging him with violation of the narcotic laws. The record before the Commissioner further shows that Passero waived examination and he was thereupon held to answer the charges in the district court.

Commissioner Schiffman's records further show that two days later, on September 17, counsel for Passero moved to reduce the bail and that this was reduced to $15,000 upon consent of the United States Attorney.

From these undisputed record facts we conclude that Passero knew of the complaint on September 15 and his counsel knew of it two days later. In addition, counsel here has conceded that he was at all times familiar with the procedure before the Commissioner including the fact

that a complaint was on file there. Thereafter, on October 1, 1959, the indictment was filed and the clerk's minutes note that on October 13, 1959 the Commissioner's papers were filed with the clerk. Thus Dick's complaint was a public record in the case.

On such a record a court will not permit a defendant or his counsel to claim that they were uninformed of the contents of a vital document in the very case. Indeed even where an arrest warrant was not filed in the district court, we have held that counsel's negligence in failing to obtain such a complaint for use at trial precluded the grant of a new trial to his client. *United States* v. *Walker*, 197 F. 2d 287 (2d Cir. 1952), *cert. denied* 344 U. S. 877. Any other rule would put a premium on carelessness and neglect; it would encourage a strategy of not making use of available information with the thought that its later "discovery" might be the basis for a new trial if the result of the trial was adverse. Apparently Judge Bartels credited counsel's assertion that he was not aware of the statements of the complaint until his preparation of the appeal papers and by what we say we do not mean to intimate that we disagree with the trial judge's finding of that fact. We hold that such an inquiry is immaterial where the circumstances are such as to charge the defendant and his counsel with knowledge. If the defense knows that there was a complaint on file, as we have demonstrated that it must have, it will not be heard to complain of its own failure to make use of such a document when the case was tried.

We think that these considerations also dispose of Passero's claim that he was improperly prejudiced because the government permitted Dick to testify without "alerting the

defense, the court and the jury to the existence of Agent Dick's false affidavit covering the same subject matter." Surely the prosecutor was under no duty to call to the attention of the defense a paper which everyone knew to be in existence. It is not the business of the government to suppose that a defendant and his counsel do not know what is in the case file which was equally available to the defense for over five months before trial and during the trial.

Nor is there any basis for a claim that the government has knowingly used perjured testimony. Compare *Alcorta* v. *Texas*, 355 U. S. 28 (1957) and *Napue* v. *Illinois*, 360 U. S. 264 (1959). The fact that there is a material difference between Dick's trial testimony and his sworn complaint does not mean that the testimony at trial is not true. Indeed the trial testimony is less damaging to Passero as Dick testified only that he saw Passero at the scene on August 27, whereas in his complaint he stated that he witnessed the delivery of the narcotics and the payment of the money. Dick's trial testimony was not inconsistent with the testimony given by the other government agents and by the informer. While cross-examination of Dick about the statements in his complaint might well have damaged his credibility, we do not see how the statements in the complaint prove that his trial testimony was perjurious. It follows that, regardless of the government's knowledge of the change in Dick's version of what he saw on August 27, the government cannot fairly be criticized for using evidence which it had no reason to believe was not true. For these reasons we see no basis for Passero's assertion that a new trial should be granted in the interest of justice. On the contrary, we think that it would be frustrating to the

due administration of criminal justice if defendants were permitted, after a verdict of guilty, to claim ignorance of matters of record in the court files of the case.

A review of the evidence leaves us with the firm impression that there has been no miscarriage of justice in this case;[4] anything short of that does not justify making an exception to the salutary rule that parties may not later complain of their ignorance of what was in the court file and available to them at all times.

For these reasons we affirm the denial of the motion for a new trial.

We have examined the allegations of error in the conduct of the trial and find them to be without merit.

Passero complains of prejudicial statements in the prosecutor's summation to the jury. In response to the defense argument that the government was improperly relying on guilt by association, the prosecutor argued that "when you walk like a duck, talk like a duck, and you look like a duck, you are a duck." Although the image may not have

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[4] There is no merit to Passero's contention that Agent Dick's testimony of Passero's statements at the time of his arrest on September 14 would have been inadmissible if counsel had known of the false statement in Dick's sworn complaint of May 8, 1960. Whether or not the arrest was legal, incriminating statements made while an accused is under arrest are admissible if made voluntarily. *United States* v. *Walker*, 197 F. 2d 287, 289 (2d Cir. 1952), cert. denied 344 U. S. 877; *Smith* v. *United States*, 254 F. 2d 751, 758 (D. C. Cir. 1958), cert. denied 357 U. S. 937; cf. *Bringgar* v. *United States*, 165 F. 2d 512 (10th Cir. 1947), aff'd 338 U. S. 160 (1949). There is no evidence in the record that suggests that Passero was in any way coerced or that there was an "unnecessary delay" before he was arraigned before the United States Commissioner.

At trial no objection was taken to the admission of this evidence. Moreover, counsel did not even cross-examine Dick to ascertain the basis for Passero's arrest.

been particularly apt, the remarks were in no way improper and indeed focused the jury's attention upon the evidence that tended to show Passero's guilt. In summation the prosecutor also stated that "If you don't believe the agents you may just as well close the book on the prosecution of narcotics." Any possibly harmful effect of this comment, which was made in response to a sharp attack upon the agents' credibility, was cured by the judge who termed the remark "inaccurate and improper" and instructed the jury to completely ignore and disregard it.

Passero complains of the judge's charge in several respects but we find each of the objections without merit. The court's charge fully and clearly discussed the factors bearing upon credibility and charged that the jury could disregard the entire testimony of Williams because it was false in part or discount it because of his criminal record. Similarly the portion of the charge relating to the effect of character testimony was more than adequate to instruct the jury. See *United States* v. *Kimmel*, 274 F. 2d 54, 57 (2d Cir. 1960).

Passero complains that he was prejudiced by the judge's instruction concerning the effect of the dismissal of Count VI upon the testimony that connected Passero with Moore. The court stated that its dismissal was not a finding "that the defendant Passero was or was not in an automobile. • • • This dismissal does not constitute a reflection upon the credibility of any witnesses • • • " The instruction was proper since the jury might well have considered the dismissal to constitute a reflection upon the credibility of the agents who had testified that Passero was driving Moore immediately before she was arrested and found carrying

narcotics, although in fact the dismissal was prompted by the fact that no connection between Passero and the narcotics in Moore's pocketbook had been shown. Although Passero may have been entitled to a further instruction that the jury should not consider the evidence on Count VI against him, he did not make any such request. In any event, the court's less specific instruction that the jury consider the question of the defendants' guilt or innocence "of the offenses for which they are on trial" and the final reminder that "only defendant Moore is involved in Count VI" sufficiently advised the jury as to what they should consider.

Affirmed.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty seventh day of April one thousand nine hundred and sixty one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. CALVERT MAGRUDER,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ANTHONY PASSERO,
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

July 22, 1960

Appearances:

CORNELIUS W. WICKERSHAM, JR., Esq.
United States Attorney
Eastern District of New York
Attorney for United States of America
FRANCIS W. RHINOW, Esq.
Assistant United States Attorney
Of Counsel

JEROME LEWIS, Esq.
Attorney for Defendant

BARTELS, *D.J.*

Two motions, one by defendant for a new trial on the ground that the complaint of Fred T. Dick, a United States Narcotic Agent, on which the warrant of arrest against defendant was issued, was false and fraudulent, and the other by the United States Government for an order revoking the bail of the defendant and for remand.

On September 14, 1959 defendant was arrested on the authority of a warrant issued May 8, 1959 by a U. S. Commissioner for the Eastern District of New York, was ar-

raigned on September 15, 1959 and held on bail. The affidavit or complaint on which the arrest warrant was issued, was made by Dick and sworn to before the Commissioner on May 8, 1959. The affidavit described the sale by one Vincent Papa and the defendant on August 27, 1958 of a narcotic drug contrary to law (Title 21, United States Code, Section 174; Title 18, United States Code, Section 2). The pertinent portion of this affidavit reads as follows:

> "That the source of your deponent's knowledge is a conversation had between William H. Newkirk and Anthony Passero, one of the defendants herein, in which Newkirk related to your deponent that he had placed an order with Passero for the above-mentioned amount of heroin; personal observations by your deponent in which your deponent observed Vincent Papa, also known as Charles Rinaldi, and Anthony Passero together on the northeast corner of 42nd Road and Crescent Street in Long Island City, Queens, N. Y.; *your deponent further observed Anthony Passero walk across the street and meet William Newkirk and hand the above-mentioned heroin to him and observed Passero take money in exchange therefor;* deponent further observed the defendant Passero rejoin Papa on the above-mentioned corner and saw both defendants leave in a 1949 grey Cadillac." (Emphasis added)

Defendant was tried for making two sales of a narcotic drug in violation of law, one on October 15, 1958 and the other on August 27, 1958. Only the sale on August 27, 1958 in involved in this application. Concerning this sale the Government offered the testimony of three United States Narcotic Agents, William H. Newkirk, Arthur S. Fluhr

and Fred T. Dick, together with the testimony of a "special Government employee", Charles Williams (then serving a five-year sentence for violation of narcotics laws). Newkirk testified that at the instruction of Dick he and Williams made a telephone call at 11:50 P.M. on August 26, 1958 from New York to defendant and made an appointment to meet defendant later in Long Island City for the purpose of purchasing two pieces of heroin for $220; that pursuant to this appointment Newkirk and Williams drove to Crescent Street and 42nd Road, Long Island City and met defendant in front of 42-38 Crescent Street; that defendant then came to the car driven by Williams in which Newkirk was a passenger and handed Newkirk a newspaper containing two cellophane envelopes which contained a white substance; that thereupon Newkirk delivered to defendant $220; that defendant walked across the street and later Newkirk saw defendant and Papa driving in the vicinity in a grey Cadillac car; that Newkirk then returned to Manhattan about 12:15 A.M. on August 27th and surrendered to Dick the newspaper and cellophane envelopes (pp. 46-48).*

Agent Fluhr testified that on August 26, 1958 at about 11:50 P.M. he saw defendant enter a telephone booth in the Cocoanut Inn, Long Island City, and saw him leave the Cocoanut Inn, enter a Cadillac car and drive to Crescent Street and 42nd Road where defendant parked (p. 50).

Agent Dick testified that on August 26, 1958 he gave Newkirk $250 of Government funds and later that eve-

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* Except in the case of specific references to the available record of witnesses' testimony indicated by the letter "R", references are to summation of testimony in the Court's charge.

ning drove to Crescent Street and 42nd Road, Long Island City, where he saw defendant and Papa enter a Cadillac car and that thereafter he met Newkirk and Williams in Manhattan and received from Newkirk the newspaper and envolopes which after field tests showed positive results (pp. 53-54). On cross-examination Dick stated that he observed the meeting that night but did not know what took place. His testimony in part was as follows:

> "Q. And you don't know anything of your own personal knowledge of what took place on August 27th, 1958, do you? A. Nothing other than—
>
> Q. Not what somebody told you, your personal knowledge. A. I was going to say, sir, that I have nothing other than what I observed on that night.
>
> Q. Did you observe any money being passed from Newkirk to Passero? A. No, sir, I observed merely the meeting.
>
> Q. Did you observe any narcotics being passed from Passero to Newkirk? A. No, sir, I did not."

(R. 49-50). Dick further testified that he placed defendant under arrest on September 14, 1959 at 21-63 27th Street, Astoria, at which time and place he had a conversation with defendant wherein defendant stated that he had intended to give himself up the following day and that he would turn the 1950 Dodge Coupe (another car driven by defendant and claimed to have been used for transportation of narcotics) over to Dick because he did not want his brother (the owner of the 1950 Dodge Coupe) to suffer for what he had done (pp. 56-57).

"Special employee" Williams testified that after he and Newkirk made a telephone call to defendant from New

York on August 26, 1958, about 11:50 P.M., he drove Newkirk to Crescent Street, Long Island City, Queens, where he saw defendant and that when the car he was driving stopped at Crescent Street defendant came over and passed a package to Newkirk and Newkirk handed defendant $220. On cross-examination a number of discrepancies appeared in Williams' testimony but not in this respect (pp. 69-71).

Defendant took the stand and denied the allegations of the indictment and the testimony adduced on behalf of the Government in any way implicating him with respect to the possession, sale or transportation of narcotics and denied that he had ever made the statement attributed to him by Dick, after his arrest in September; that he had intended to give himself up the next day or that he did not want his brother to suffer because of ownership of the 1950 Dodge Coupe (pp. 62-63).

At the conclusion of an eight-day trial defendant was convicted on the charge of selling and receiving narcotics in violation of law and was sentenced to prison.

Defendant bases his application upon three contentions: (i) that the arrest was illegal since the subsequent testimony of Dick indicates that the arrest could not be based on probable cause (citing *United States* v. *Maresca*, D. C. N. Y. 1920, 266 Fed. 713, 725, and related cases) and consequently the fruits of the arrest, consisting of allegedly incriminating statements made by defendants could not be used on the trial (citing *McNab* v. *United States*, 1943, 318 U. S. 372 and related cases); (ii) that the Assistant United States Attorney violated his duty by failing to notify the Court that the arrest complaint of Dick was false and consequently the conviction was obtained by fraud

(citing *Napue* v. *Illinois*, 1959, 360 U. S. 264; *United States* v. *Spangelet*, 2 Cir. 1958, 258 F. 2d 338; and *United States* v. *McKeever*, 2 Cir. 1959, 271 F. 2d 669 and related cases); and (iii) that defendant was deprived of his opportunity to impeach the credibility of Dick by use of the allegedly false affidavit thus infusing "into the Government's case an element of fatal taint" (citing *United States* v. *Walker*, 2 Cir. 1952, 197 F. 2d 287 and related cases recognizing the inherent power of the court to grant relief where a defendant has been denied the substance of a fair trial because wrongfully deprived of the use of vital evidence).

These contentions will be considered by the Court *seriatim*. As to the first contention there was probable cause since the warrant could have been issued upon information and belief of Dick obtained from conversations with Newkirk (see, *Draper* v. *United States*, 1959, 358 U. S. 307). Moreover, the arrest in this case could have been made without a warrant inasmuch as such an arrest is permissible where "the person making the arrest * * * has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." (26 United States Code, Annotated, Sec. 7607; see also, *Washington* v. *United States*, 6 Cir. 1948, 166 F. 2d 557, 562; *Draper* v. *United States, supra.*) Defendant has been laboring under a misapprehension that the testimony of Dick concerning the so-called incriminating statements made by defendant was equivalent to a confession. This is not so because the word is not generally applicable to such testimony. Defendant never admitted making such statements under any circumstances. The issue therefore emerges as one of credi-

bility. Even if the arrest were illegal and he had made such a confession, it would have been competent evidence, since it was voluntarily made (*United States* v. *Walker*, 2 Cir. 1952, 197 F. 2d 287, 289). The cases cited by defendant in support of his contention were cases involving the fruits of illegal search and seizure and obviously inapposite. The arrest was clearly legal and the testimony of Dick concerning defendant's statements was competent and admissible.

Referring to the second challenge, defendant again has misinterpreted the authorities. His cases fall in two categories, (i) cases involving Grand Jury minutes where the duty is imposed upon the prosecutor to locate possible prior inconsistencies in the witness' testimony on the trial and call the same to the attention of the Court, and (ii) cases where the testimony of the witness on the trial is false and known to be false by the prosecutor. This case falls in neither of those categories. In the case of Grand Jury minutes only the prosecutor could know of inconsistencies, whereas in this case the inconsistencies were equally available to both parties. In the other class of cases there was false testimony on the trial. In this case no injury is claimed on the ground that Dick's testimony on the trial was false. The claim is based upon the falsity of the affidavit. Moreover, while the complaint in this case in support of the arrest was made on September 14, 1959, the case was not tried until March, 1960 and in this affidavit, sworn to July 1, 1960, the Assistant United States Attorney stated that he had no knowledge during the trial that there was any variance between Dick's statements in the complaint and his testimony on the trial.

There remains the third challenge which is the substance of the application. A review of the testimony discloses

that Dick was not an eye witness to either of the narcotic sales. The principal witness on behalf of the Government was Newkirk whose testimony was corroborated by "special employee" Williams and as to certain peripheral facts by Fluhr. The Court is therefore of the opinion that there was sufficient testimony without the testimony of Dick to warrant a conviction. It should be observed that Dick's testimony on the trial was much more favorable to the defendant than the statements in his complaint. The Court concludes that under the circumstances the defendant was not deprived of the use of a document vital to his defense nor denied the substance of a fair trial.

The above contentions are apparently not framed upon any theory of newly discovered evidence. Regardless of the form in which it is cast, it is obvious however that defendant's application is a motion for a new trial based upon newly discovered evidence and as such must be governed by the rules applicable thereto. It is well established that two recognized standards have been applied in determining whether or not a new trial shall be permitted. One is the standard originally prescribed by *Berry* v. *State*, 10 Ga. 511, 527, and the other is the standard laid down in *Larrison* v. *United States*, 7 Cir. 1928, 24 F. 2d 82. These tests have been analyzed in *United States* v. *Costello*, 2 Cir. 1958, 255 F. 2d 876, and need no elaboration here except to reiterate that the *Larrison* test is generally applied in cases of recantation of false testimony while the *Berry* test is generally applied in other cases (see, *United States* v. *Hiss*, D. C. N. Y. 1952, 107 F. Supp. 12[illegible], 136, *aff'd* 201 F. 2d 372, *cert. denied*, 345 U. S. 942, and cases cited therein). However, in this case the same result is reached regardless of

which standard is applied because under both standards the defendant has failed to satisfy the requirement of diligence in discovering the "newly discovered" evidence (see, *United States* v. *Flynn*, D. C. N. Y. 1955, 131 F. Supp. 742, 743; *United States* v. *Ward*, D. C. N. Y. 1960, 182 F. Supp. 53). The following colloquy between the Court and defendant's counsel (a former Assistant United States Attorney) on the oral argument of this motion illustrates this failure:

> "The Court: * * * You don't expect the prosecutor to remember everything Dick said in his complaint. He tries a number of cases. You didn't do it. I am sure you didn't.
>
> Mr. Lewis: Except, judge, one thing. When I prepared the case I would call the agents in. I had the file and would go over all the papers. Don't you see, the paper is in the government's file.
>
> The Court: You would call the agents in and you would go over all the papers? Is that right?
>
> Mr. Lewis: Of course, yes sir.
>
> The Court: So you would know as an assistant.
>
> Mr. Lewis: Yes.
>
> The Court: As a defendant, or representing a defendant, you would know also there were such files available and that you would examine them.
>
> Mr. Lewis: Except I wouldn't have any use for it.* * *"

In addition defendant is disqualified for other reasons. Under the *Larrison* rule he has failed to satisfy the requirement that the testimony given by the material witness was false and under the *Berry* rule he has been unable to overcome the bar that at most the "newly discovered" evidence relied on is merely impeaching and the further bar that the

"newly discovered" evidence would probably not produce an acquittal on a new trial.

This leaves for determination the Government's motion for remand. Defendant is out on bail because of a stipulation entered into between the United States Attorney and the defendant conditioned upon the defendant filing his papers on appeal within the statutory period. During this interim the defendant has filed his motion for a new trial. Defendant should not be penalized for failure to file his appendix and brief before the determination of this important motion for obvious reasons. Upon the denial of the motion, however, the defendant must prosecute the appeal with due diligence.

The motion for a new trial is denied. The motion to remand is granted, unless the defendant completes and perfects his appeal within thirty (30) days from the entry of the order herein, in which event the motion is denied. Settle order within four (4) days on two (2) days' notice.

J. R. BARTELS
U. S. D. J.

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No. Cr-46020

UNITED STATES OF AMERICA

v.

ANTHONY PASSERA

On this 1st day of April, 1960 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of Violating T. 26, 21 and 18, U.S.C., Secs. 4705(a), 174 and 2 in that on or about and between August 15th, 1958 and August 27th, 1958, at Brooklyn, New York, defendant, did knowingly and unlawfully sell, barter, exchange, receive, conceal and facilitate the concealment of a narcotic drug consisting of various amounts of heroin hydrochloride, a derivative of opium, not in pursuance of a written order on a form issued by the Secretary of the Treasury, knowing same to have been imported contrary to law as charged in Counts 1, 2, 3 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,

and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) years on each of Counts 1, 2, 3 and 4 to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and committment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN R. BARTELS,
United States District Judge.

Order of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The above named defendant, Anthony Passero, having been indicted by a Federal Grand Jury for the Eastern District of New York, filed the 1st day of October 1959 and numbered Criminal #46020, charging the said defendant with the crime of selling a narcotic drug not in pursuance of a written order on a form issued by the Secretary of the Treasury, and with receiving, concealing and facilitating the concealment of a narcotic drug, knowing the same to have been imported into the United States contrary to law, and the defendant having moved for an order directing a new trial,

Now, on reading and filing the notice of motion, dated the 17th day of June 1960, the affidavit of Jerome Lewis, Esq., attorney for the defendant, duly sworn to the 17th day of June 1960, and the affidavits of Francis W. Rhinow, Assistant United States Attorney for the Eastern District of New York, duly sworn to the 24th day of June 1960 and the 1st day of July 1960, and the reply affidavit of Jerome Lewis, Esq., duly sworn to on the 5th day of July 1960, and the accompanying memorandum of law of both parties filed therewith, and after hearing Jerome Lewis, Esq., counsel for the defendant, in support of said mo-

tion, and Francis W. Rhinow, Assistant United States Attorney, in opposition thereto, on the 24th day of June 1960, and due deliberation having been had thereon, it is hereby

ORDERED that the motion on behalf of the defendant, Anthony Passero, for an order directing a new trial be and hereby is in all respects denied.

Dated: Brooklyn, New York
July 29, 1960.

JOHN R. BARTELS
United States District Judge